

# Greenberg Traurig

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## **BY CM/ECF AND HAND DELIVERY**

The Honorable Joseph J. Farnan, Jr.  
United States District Court  
District of Delaware  
844 King Street  
Wilmington, DE 19801

Re: ***Magten Asset Management Corp. and Law Debenture Trust Co.  
v. NorthWestern Corp.; C.A. No. 04-1494-JJF***  
***Magten Asset Management Corp. v. Mike J. Hanson and  
Ernie J. Kindt; C.A. No. 05-0499-JJF***

Dear Judge Farnan:

I write on behalf of Defendant NorthWestern Corporation in response to the letter of this date by counsel for Plaintiffs in these actions.

There is nothing in the local rules or the Court's individual rules to support Plaintiffs' contention that a *Daubert* motion seeking to exclude the testimony of expert witnesses cannot be made without leave of the Court. Indeed, only yesterday, counsel based her request for an extension of the briefing schedule on an *ex parte* communication with Chambers. Neither was NorthWestern required to seek Plaintiffs' consent before filing the motion. We conferred with Plaintiffs' counsel on January 10 only in order to determine whether Plaintiffs would agree to the requested relief, as the local rules require for non-dispositive motions.

Given the nature of NorthWestern's *Daubert* motion in the context of this case, we believe it is prudent for the Court to consider the motion now. Plaintiffs continue to struggle to connect NorthWestern's misstated financial statements to the Going Flat Transaction. Based on their latest theory, a significant portion of Plaintiffs' case now rests upon the testimony of their two experts. The first one could not explain the methodology for his impairment analysis and was forced to withdraw his earlier testimony. The second not only relied on the faulty opinions of the first, but also offered an opinion as to how the Montana Public Service Commission (MPSC) would rule in a hypothetical situation despite his lack of experience before the MPSC and the prohibition regarding an expert offering a legal conclusion.

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These are not the typical motions *in limine* that can and are routinely dealt with on the eve of trial. Given the qualifications, methodology and fit of Plaintiffs' experts, NorthWestern submits that it is likely a hearing will be required to determine if their testimony should be received. The Court's decision will substantially effect the conduct of the trial.

Plaintiffs should respond to the motions without further delay so the Court can have the benefit of addressing these issues at the pre-trial conference or otherwise at the Court's convenience prior to the start of trial.

Respectfully submitted,



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